Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 2000

JIE HU and SHAO ZHEN LIN,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Is it a violation of the Fourth Amendment's "particularity" requirement for federal agents to obtain authorization from a magistrate to seize documents evidencing a particular form of fraud, but then to search for and seize an enormous quantity of confidential records based on an entirely separate, dubious theory of fraud they had withheld from the issuing magistrate?

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JIE HU and SHAO ZHEN LIN,

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against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Jie Hue and Shao Zhen Lin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 27, 2000.

Opinions Below

The opinion of the Court of Appeals, *United States v. Liu*, 239 F.3d 138 (2d Cir. 2000), appears as Appendix A to this petition. That court's order, entered February 13, 2001, denying a petition for rehearing is not yet reported and appears as Appendix B. The district court's unreported decisions concerning a pretrial

motion to suppress the fruits of a search appear as Appendices C, D, and E.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 27, 2000. The Court of Appeals denied a timely petition for rehearing by an order entered on February 13, 2001. This petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. Background

As employees of the Foochowese Translation Center ("FTC") in New York's Chinatown, petitioners Jie Hu and Shao Zhen Lin helped recent immigrants complete English-language forms required by the Immigration & Naturalization Service ("INS") and other government agencies. Based on their alleged

assistance to two government informants who participated in a 10-month-long undercover investigation that ended in July 1997, Hu and Lin were indicted, along with Lin's husband, Shi Yan Liu, for conspiring to submit fraudulent political asylum applications to the INS, in violation of 18 U.S.C. §1546.

Immediately following petitioners' arrests, a team of INS agents, on the authority of a warrant issued by a federal magistrate, conducted an extensive search of the FTC offices in which they seized over 66,000 pages of documents, and a diverse collection of other materials. The affidavit submitted by an INS agent in support of that warrant had alleged that the petitioners had assisted the two government informants prepare political asylum applications containing false narrative descriptions of the persecution they had suffered. Based on such allegations, the agent convinced the magistrate that there was probable cause to believe the FTC was engaged in a practice of supplying fictitious stories about persecution in China to applicants for political asylum, and to authorize the seizure of:

> Documents containing fraudulent statements in relation to political asylum applications, fraudulent birth certificates, "boiler-plate" political asylum applications, fictitious stories outlining political persecution, receipts and financial records relating to these asylum applications, including computer records, in violation of Title 18, United States Code, Section 1546.

At a pretrial hearing, the INS agent who supervised the search acknowledged that he did not discover a single document on the premises that contained a discernibly "fictitious" account

of political persecution – the sole type of "fraudulent statement" referred to in the warrant and the underlying affidavit. (H. 180)[1] Nonetheless, the agent determined that asylum applications in the FTC's client files contained "fraudulent statements" because they listed petitioner Lin's home address (on Van Doren Street) as the "mailing address" of applicants who did not in fact live at that address. (H. 15-16, 165-70) After examining approximately 50 files, and finding the Van Doren address on "most" of them, the agent directed the seizure of every one of the approximately 1,200 political asylum files found in petitioners' file cabinets. The agents also seized thousands of pages of additional materials – including bank statements, address books, and appointment books – that bore no relation at all to asylum applications. (H. 20-22, 180)

Although the agent had been aware for many months that the FTC used the Van Doren address on many of the applications it prepared (and that comparable agencies throughout the country similarly utilized an address under their control where vital notices from the INS could be received and communicated to their transient, non-English-speaking clients) (H. 15-19), his search warrant affidavit did not present any information regarding this practice to the issuing magistrate, and thus did not give the magistrate an opportunity to evaluate the agent's theory that the listing of such an address would render a document "fraudulent." During the hearing, the agent was unable to point to any law, regulation, or other authority for his conclusion that

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[1] Record references preceded by "H" are to the transcript of the pretrial suppression hearing; references preceded by "T" are to the trial transcript.

an alien's use of such a mailing address indicated that an application contained "fraudulent" statements.[2] (H. 171)

II. The Motion to Suppress the Fruits of the Search

In a pretrial motion to suppress the fruits of the search, petitioners argued, *inter alia*, that applications containing the Van Doren Street address were not "fraudulent" within the meaning of 18 U.S.C. § 1546 (the statute referred to in the warrant), and that those items and their fruits should be suppressed because they were outside the scope of the warrant. Petitioners also contended that, by seizing those applications as well as a wide array of other materials that bore no relation to asylum applications (a fact that the government in large measure conceded), the agents had flagrantly disregarded the terms of the warrant.

In the alternative, petitioners argued that, if the warrant was sufficiently broad to permit seizure of documents that were "fraudulent" on the theory that they listed Lin's address as the applicant's "mailing address," the INS agent's failure to present this theory to the issuing magistrate resulted in a violation of the Fourth Amendment's requirement that warrants "particularly" describe the things to be seized. Petitioners argued that, instead, the warrant improperly left to the discretion of the executing

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[2]At petitioners' trial, the government acknowledged that it would not contend that a fraud conviction could be based on the use of a "false" address in an asylum application (T. 1855-57), and the district court instructed the jury that the use of the Van Doren Street address was "not to be considered by you in determining whether or not those political asylum applications contain false, fictitious or fraudulent statements" (T. 1887).

agents the determination of which items could be deemed "fraudulent."

In an oral decision, the district court rejected these arguments. Appendix C. On reconsideration, the court granted a hearing to resolve whether government agents had acted in flagrant disregard of the warrant. Appendix D. At the conclusion of that hearing, petitioners renewed their challenge to the warrant's "particularity" based on testimony of the supervising agent concerning his awareness of the so-called "false address" practice at the time he applied for the warrant. The district court, however, adhered to its initial decision. Appendix E.

III. Petitioners' Trial and Sentence

Following the seizure of the 1,200 client files, the government, apparently relying on evidence derived from the fruits of that search[3], filed two superseding indictments that substantially expanded the scope of the charged conspiratorial agreement. The subsequent indictments alleged that the conspiracy began more than three years prior to the undercover investigation involving the two government informants, and that the petitioners prepared false political asylum applications on behalf of at least 16 of their actual clients, each of whom became

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[3]Because the district court ruled that there had not been a violation of the Fourth Amendment, petitioners have not had an opportunity to litigate the issue of taint. *See Alderman v. United States*, 394 U.S. 165, 181-85 (1969)(government is not required to disclose evidence to enable a defendant to substantiate a claim that evidence at trial was tainted until a Fourth Amendment violation is established).

the subject of substantive counts in the indictment. At trial on the second superseding indictment, the government presented testimony of two FTC clients whom Lin had assisted in 1994, as well as the testimony of the two government informants, whose first contact with the agency was in 1996. The court charged the jury that it could consider the filing of the allegedly false 1994 applications against Hu and Lin with respect to the conspiracy charge. At the conclusion of the trial, Hu and Lin were acquitted of the substantive counts relating to the two actual clients, but they were found guilty of the charged conspiracy, as well as substantive counts relating to an application filed on behalf of one of the informants in 1994.

Notwithstanding the verdict indicating that the petitioners may have gone "over the line in terms of assisting people with political asylum applications," the district court recognized that petitioners were law-abiding individuals who conducted a legitimate business, and it sentenced them to one-year terms of probation, with Lin's term including four months of home detention.

IV. The Court of Appeals' Opinion

On appeal, petitioners again argued, *inter alia*, that, while the search warrant and the underlying affidavit had described only one form of fraud – the creation of false stories describing political persecution in China – the INS had identified asylum applications as "fraudulent" and seized them based on the entirely different theory, not presented to the magistrate, that they bore a "false" address, in violation of the "particularity" requirement. The Court of Appeals, however, held that the warrant was adequately particularized because it "identified the statute that had allegedly been violated, and authorized only the

seizure of a relatively narrow range of items." Appendix A, p. 4a. In its cursory resolution of this issue, the court did not discuss the supervising agent's failure to ask the issuing magistrate for permission to seize documents on this dubious theory of fraud, a theory that the agent had been investigating for months.

REASONS FOR GRANTING THE WRIT

This Court should resolve a conflict among the Circuits concerning the obligation of government agents, under the Fourth Amendment, to disclose available information necessary for a magistrate to "particularly describe" the items to be seized pursuant to a warrant.

As this Court has long recognized, the Fourth Amendment's requirement that search warrants "particularly describe . . . the persons or things to be seized" serves a number of fundamental purposes. The "particularity" requirement ensures that a decision to invade an individual's interest in property will not be left to the discretion of zealous officers "engaged in the often competitive enterprise of ferreting out crime," but will be made by a "neutral and detached magistrate." *Johnson v. United States*, 333 U.S. 10, 14 (1948). It prevents "general, exploratory rummaging in a persons belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), and other hallmarks of the "general searches" that were abhorred by the American colonists. Additionally, it prevents:

> the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927). *See also Maryland v. Garrison*, 480 U.S. 79, 84 (1987)("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit").

The present case offers this Court an opportunity to consider, as it never has before, whether government agents defeat the fundamental purposes served by the "particularity" requirement when they withhold from the issuing magistrate information that they will ultimately rely on to determine which documents to seize under the warrant. While, as indicated in the cases cited in the paragraph above, this Court has repeatedly emphasized the important function of the "particularity" requirement, it has not spoken to the obligations that requirement imposes on the agents who seek a warrant, as opposed to the judicial officer who issues it. The distinction is significant because an issuing magistrate is necessarily dependent on law enforcement officers to supply the facts pertinent to the warrant. As a practical matter, the magistrate's ability to comply with the constitutional mandate to "particularly describe" the things to be seized hinges on the information supplied by government agents. Granting certiorari in the present case will allow this Court to provide much-needed, authoritative guidance to law enforcement officers concerning their obligations in this regard.

This case presents this opportunity in the especially sensitive context of searches involving documents that are not readily identifiable as contraband or evidence of a crime. As a leading commentator has observed:

> Search warrants for documents are generally deserving of somewhat closer scrutiny with respect to the particularity requirement because of the potential they carry for a very serious intrusion into personal privacy. As the Supreme Court noted in *Andreson v. Maryland* [427 U.S. 463 (1976)], there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized.

W. LaFave, Search and Seizure § 4.6(d) (3d ed. 1996).

While the warrant here authorized the seizure of documents containing "fraudulent statements" relating to political asylum applications, it did not provide any specific guidance as to how the agents executing the warrant were to identify which of the many applications kept in the FTC's client files were "fraudulent." The underlying affidavit presented facts relating to only one type of "fraudulent" statement: "fictional" or "boilerplate" stories outlining political persecution at the hands of Chinese authorities. The agents did not discover *any* documents that fit that definition of fraud, but they nonetheless seized approximately 1,200 confidential client files based on their observation that some of them utilized what the agents characterized as a "false" address.

The warrant, however, did not make any reference to "false" addresses as a criteria for identifying "fraudulent" documents. Even though the supervising INS agent was aware of the FTC's practice of using petitioner Lin's "Van Doren Street" address as the applicants' mailing address on multiple applications, he did not inform the magistrate of that information or of his intention to rely on the presence of that address as an indicator that a document contained a "fraudulent statement." As a result, the magistrate never had an opportunity to assess the agent's legal conclusion that the use of the Van Doren Street address would render an asylum application "fraudulent." The decision that such documents could be seized on that basis was not made by a "neutral and detached magistrate," but by the "zealous officers" who conducted the search. *Johnson*, 333 U.S. at 14.

In view of the agent's inability to articulate a basis for his conclusion that listing the Van Doren Street address constituted fraud, and the district court's instruction to the jury that the use of that address could *not* support a fraud conviction, the agent's legal conclusion was extremely dubious. The Second Circuit's tacit approval of the agent's reliance on the observation of the Van Doren address as a basis to seize documents is anomalous, since it is unaccompanied by any discussion of a rationale for treating that address not only as an indicator that the documents on which it appeared were "fraudulent," but as a justification for the seizure of every one of the 1,200 client files on the premises. The Court of Appeals did not attempt to reconcile its implicit conclusion that the warrant authorized that wholesale seizure of documents with its conclusion that the warrant "authorized only the seizure of a relatively narrow range of items." Appendix A, p. 4a.

In its discussion of petitioners' challenge to the warrant's compliance with the "particularity" requirement, the Second Circuit treated the agent's undisclosed knowledge of the "false" address practice as a matter of no consequence. Without mentioning that information or the government's failure to disclose it to the magistrate, the Court simply announced its conclusion that the warrant was sufficiently "particularized" because it "identified the statute that had allegedly been violated, and authorized only the seizure of a relatively narrow range of items." Appendix A, p. 4a.

By effectively holding that a warrant's compliance with the "particularity" requirement could be assessed solely by looking to the face of the warrant, the Second Circuit followed an approach that is at odds with that of several other Circuits, which recognize that the "particularity" requirement implicates a responsibility on the part of government agents to provide available information to the issuing magistrate that could be used to specify the items to be seized. The Tenth Circuit, for example, has recognized that "the fourth amendment requires that the government describe the items to be seized with *as much specificity as the government's knowledge and circumstances allow* . . ." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988)(emphasis added).

The First Circuit held, in *United States v. Fucillo*, 808 F.2d 173, 176 (1st Cir.), *cert. denied*, 482 U.S. 905 (1987), that the duty of law enforcement agents to advise the magistrate of available information in order to ensure that the warrant specifically describes the items to be seized is particularly important in cases in which lawful items that fall within the same general classification are likely to be found at the same

location as the unlawful objects that are to be seized. In *Fucillo*, FBI agents had applied for authority to seize cartons of stolen women's garments from warehouses, but the warrant did not explain how the agents were to distinguish *stolen* garments from other garments on the premises. Holding that the warrant violated the "particularity" requirement, the First Circuit observed that "the FBI clearly could have obtained specific information for presentment to the magistrate and placement in the warrant which would have enabled the agents executing the FAD and Milford warehouse searches to differentiate contraband cartons of women's clothing from legitimate ones." 808 F.2d at 176-77. As a result of their failure to do so, the agents "had no 'physical criteria or detailed description in the warrant to enable them to determine what they might lawfully seize. . . .'" *Id.* at 177, quoting *Montilla Records of Puerto Rico v. Morales*, 575 F.2d 324, 326-27 (1st Cir.1978).

Similarly, in contrast to the approach followed by the Second Circuit in the present case, the Ninth Circuit has recognized that a warrant's particularity should be assessed with reference to the information that was known to the agents who applied for the warrant:

> In determining whether a description is sufficiently precise, we have focused on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant, . . . (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, . . . and (3) *whether the government was able to describe the items more particularly in light of the*

> *information available to it at the time the warrant was issued . . . .*

United States v. Spilotro, 800 F.2d 959, 963 (9th Cir.1986)(emphasis added).

Thus, in *United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989), the Ninth Circuit affirmed an order suppressing the fruits of a search because "[t]he IRS knew both what the seizable documents looked like and where to find them, but this information was not contained in the warrant." *See also United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995)(warrant was insufficiently particularized because it relied on "generic classifications" even though "[t]he government could have made the warrant more particular").

Wide-ranging searches and seizures of documents can inflict serious damage to the legitimate privacy interests of individuals, legitimate businesses, and their customers or clients, as the questionable seizure of 1,200 confidential client files in this case demonstrates. This Court should grant certiorari so that it can resolve the conflict among the Circuits concerning the extent of law enforcement agents' obligation to ensure that search warrants comply with the "particularity" requirement.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

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Appendix A
Opinion of the USCA for the Second Circuit
Decided December 27, 2000 [Pages 1a – 11a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: October 18, 2000

Decided: December 27, 2000)

Docket Nos. 00-1037(L), 00-1038(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

SHI YAN LIU, a/k/a Simon Liu,

Defendant,

JIE HU and SHAO ZHEN LIN,

Defendants-Appellants.

Before:

MESKILL, CABRANES, and POOLER,

Circuit Judges.

Appendix A
Opinion of the USCA for the Second Circuit

Appeal from judgments of conviction entered by the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*) following a jury trial. We hold, *inter alia*, that government agents do not flagrantly disregard the terms of a warrant so that all fruits of their search must be suppressed when they conduct a search that bears none of the hallmarks of a general search.

Affirmed.

JOEL B. RUDIN, New York, NY, *for defendant-appellant Jie Hu.*

JEREMY GUTMAN, New York, NY, *for defendant-appellant Shao Zhen Lin.*

MICHAEL GILBERT, Assistant United States Attorney for the Southern District of New York (Kevin S. Reed, Jamie L. Kogan, and Christine H. Chung, Assistant United States Attorneys, *on the brief*), *for appellee.*

JOSÉ A. CABRANES, *Circuit Judge*:

Defendants Jie Hu and Shao Zhen Lin appeal from judgments of conviction entered by the District Court (Sidney H. Stein, *Judge*) on January 25, 2000. For the reasons stated below, we affirm the judgments.

The following facts are not in dispute. At all relevant times, Hu and Lin were employees of a New York immigration assistance agency ("the agency"). On October 2, 1996, Wing Fung Chau, a government informant posing as an

undocumented alien, met with Hu at the agency. During the meeting, Chau signed a blank copy of Immigration and Naturalization Service ("INS") Form I-589, an application for political asylum, and left it at the agency. Chau subsequently spoke with Lin. The content of Chau's conversations with Hu and Lin is discussed below to the extent relevant.

On November 8, 1996, the agency filed a completed asylum application with the INS on Chau's behalf. The completed application contained an allegedly fictitious account of Chau's persecution in China.

On July 8, 1997, a grand jury in the Southern District of New York returned an indictment that charged Hu and Lin with conspiring to file fraudulent political asylum applications in violation of 18 U.S.C. § 371.[1] On July 10, 1997, United States Magistrate Judge Theodore H. Katz issued a search warrant ("the warrant") authorizing INS agents to search the agency. The agents did so, and seized various materials. Hu and Lin then moved to suppress these materials, and on November 16, 1998, the District Court denied their motion in a ruling from the bench.

A trial followed, and on July 22, 1999, the jury returned its verdicts, convicting both Hu and Lin on one count each of conspiring to submit fraudulent political asylum applications to the INS in violation of 18 U.S.C. § 371, and on two counts each of preparing and filing fraudulent political asylum applications in violation of 18 U.S.C. § 1546. The District Court entered judgment accordingly, and this timely appeal followed.

On appeal, Hu and Lin press four substantial arguments, none of which is persuasive.

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[1] Subsequently filed superseding indictments added counts of, *inter alia*, preparing and filing fraudulent asylum applications in violation of 18 U.S.C. § 1546.

Appendix A
Opinion of the USCA for the Second Circuit

I.

First, appellants contend that their motion to suppress should have been granted because the warrant issued by Magistrate Judge Katz was insufficiently particular. We disagree. A warrant must be "sufficiently specific to permit the rational exercise of judgment [by the executing officers] in selecting what items to seize." *United States v. LaChance*, 788 F.2d 856, 874 (2d Cir. 1986) (internal quotation marks omitted). The warrant here met this standard. It identified the statute that had allegedly been violated, and authorized only the seizure of a relatively narrow range of items—namely, "[d]ocuments containing fraudulent statements in relation to political asylum applications, fraudulent birth certificates, 'boiler-plate' political asylum applications, fictitious stories outlining political persecution, [and] receipts and financial records relating to these asylum applications, including computer records."

II.

Appellants next argue that the INS agents' search was conducted in "flagrant disregard" of the warrant so that *all* fruits of the search must be suppressed. Again, we disagree.

Government agents "flagrantly disregard" the terms of a warrant so that wholesale suppression is required only when (1) they effect a "widespread seizure of items that were not within the scope of the warrant," *United States v. Matias*, 836 F.2d 744, 748 (2d Cir. 1988), and (2) do not act in good faith, *see Marvin v. United States*, 732 F.2d 669, 675 (8th Cir. 1984) (holding that complete suppression is inappropriate where government "agents attempted to stay within the boundaries of the warrant and . . . the extensive seizure of documents was prompted largely by practical considerations

and time constraints"); *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir. 1985) (similar); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982) (similar); *United States v. Heldt*, 668 F.2d 1238, 1269 (D.C. Cir. 1981) (similar); *see also United States v. Foster*, 100 F.3d 846, 852 (10th Cir. 1996) (ordering blanket suppression when "at the time he obtained the warrant, [the officer who applied for it] . . . knew that the limits of the warrant would not be honored"); *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (similar).

The cornerstone of the blanket suppression doctrine is the enduring aversion of Anglo-American law to so-called general searches. Such searches—which have been variously described as "wide-ranging exploratory searches," *Maryland v. Garrison*, 480 U.S. 79, 84 (1987), and "indiscriminate rummaging[s]," *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992)—are especially pernicious, and "have long been deemed to violate fundamental rights." *Marron v. United States*, 275 U.S. 192, 195 (1927); *see also, e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) ("Since before the creation of our government, [general] searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. The need of protection against them is attested alike by history and present conditions." (internal citation omitted)). Eliminating general searches was the basic impetus for the Fourth Amendment's Warrant Clause, *see Garrison*, 480 U.S. at 84, and the instruments that authorized government agents to conduct such searches were much-reviled throughout the colonial period.[2]

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[2] During that period, general searches were conducted pursuant to, *inter alia*, general warrants and writs of assistance. *See Vernonia School District 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting)

The rationale for blanket suppression is that a search that greatly exceeds the bounds of a warrant and is not conducted in good faith is essentially indistinguishable from a general search. *See United States v. Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000) (collecting cases); *cf. United States v. Dzialak*, 441 F.2d 212, 217 (2d Cir. 1971) (describing law enforcement officers as conducting a "general search" when "[i]n executing what was a very precise warrant, the[y] spent more than four hours ransacking a[ ] house for any possible incriminating evidence," and "[o]f the items seized, those which were not described in the warrant far outnumbered those described"). Accordingly, to satisfy the first prong of the two-part test described above, the search conducted by government agents must *actually resemble* a general search.[3] *See Heldt*, 668 F.2d at 1262 (declining to require "complete

(collecting sources). To great acclamation in the American colonies, Chief Justice Pratt (later Lord Camden) criticized general warrants on the ground that they would permit "the secret cabinets and bureaus of every subject in this kingdom [to] be thrown open to the search and inspection of a messenger." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1063 (C.P. 1765); *see also Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763) (similar). *See generally* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 397 (1995) (noting that Lord Camden became "famous" throughout the colonies for these views). Similarly, in a 1761 argument before a Boston court, James Otis, the Massachusetts lawyer and legislator, described the writs of assistance "as the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that was ever found in an English law book." JAMES OTIS, SPEECH ON THE WRITS OF ASSISTANCE (1761), *in* 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE 7 n.35 (2d ed. 1991). John Adams later characterized Otis's argument to the court as the precise moment when "the child Independence was born." *See Boyd v. United States*, 116 U.S. 616, 625 (1886). *See generally* Thomas Davis, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 561 n.20 (1999) (describing dissemination of Otis's argument in the colonies).

3 To satisfy the second prong, it is not the search *itself* that must resemble a general search. Rather, the search must resemble a general search in the sense that it—like a general search—is not conducted in good faith.

suppression" when conduct of government agents did not "result[ ] in a general search"); *Rettig*, 589 F.2d at 423 (ordering blanket suppression where, "[a]s interpreted and executed by the [searching] agents, th[e] warrant became an instrument for conducting a general search"). *See generally Dzialak*, 441 F.2d at 217 (describing a general search).

Here, appellants claim, *inter alia*, that government agents seized some asylum application files without first determining that they contained "fraudulent statements," as required by the warrant. Accordingly, appellants argue, Judge Stein erred in not granting their motion for wholesale suppression.

We are not persuaded. At a suppression hearing, the INS agent who supervised the search testified—credibly, Judge Stein found—as follows: during the search he spent approximately 30 minutes reviewing asylum application files contained in agency file cabinets; of the files he reviewed in that time, "pretty much all of the[m]" listed the asylum applicant's address as 55-03 Van Doren Street; such repetition of one address indicated that the applications might include fraudulent statements; and he ordered all files in the file cabinets seized—even the ones that he had not individually searched.

These actions bear none of the hallmarks of a general search: They suggest a fairly systematic inventory, not "indiscriminate rummaging," and a search for items enumerated in the warrant, not an "exploratory" search for items not mentioned there. Indeed, federal courts have repeatedly held that such actions as were taken by the INS agents in this case, standing alone, do not support a finding that government agents have flagrantly disregarded the terms of a warrant. *See, e.g., United States v. Hargus*, 128 F.3d 1358, 1363 (10th Cir. 1997) (holding that where government agents

were authorized by a warrant to search for "broad categories" of documentary evidence, and records belonging to each category were found in every drawer of some file cabinets, the officers did not "grossly exceed" the terms of the warrant when they seized *entire* file cabinets so that complete suppression was required) (collecting cases).

Accordingly, even assuming *arguendo* that the INS agents exceeded the bounds of the warrant when they seized individual agency files without first searching them, we hold that appellants have not shown that the agents' search resembled a general search. We therefore conclude that the first prong of the two-part test for flagrantly disregarding the terms of the warrant has not been satisfied, and wholesale suppression—a remedy that we have described as "drastic," *Matias*, 836 F.2d at 747—is not required here. *See generally Foster*, 100 F.3d at 852 (observing that "the extreme remedy of blanket suppression should only be imposed in the most extraordinary of cases" (internal quotation marks omitted)).

In light of our conclusion that the first prong of the applicable test has not been satisfied, we do not reach the question of whether the proper approach to "good faith" in this context is objective or subjective. *Compare, e.g., United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (describing a "good-faith inquiry . . . confined to the *objectively* ascertainable question [of] whether a reasonably well trained officer would have known that the search was illegal") (emphasis added), *with* DELUXE BLACK'S LAW DICTIONARY 693 (6th ed. 1990) (defining "good faith" in a subjective fashion as, *inter alia*, "an honest belief, the absence of malice").

Appendix A
Opinion of the USCA for the Second Circuit

III.

Appellants' third argument is that the evidence was insufficient to support the jury's conspiracy verdict because it failed to establish the existence of an agreement between Hu and Lin. We believe, however, that a rational juror could have found that such an agreement existed. *See generally Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that a verdict must be sustained against a sufficiency of the evidence challenge if "*any* rational trier of fact could have found the essential elements of the [charged] crime beyond a reasonable doubt"); *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (noting that deference to a jury's verdict is "especially important when reviewing a conviction of conspiracy. . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel" (internal quotation marks and citations omitted)). A rational juror could have found beyond a reasonable doubt that at his October 2, 1996 meeting with Chau, Hu outlined three "persecution stories" for possible use in Chau's asylum application; picked one of these stories for use in the application, not because it was true, but because it was most likely to induce the INS to grant Chau asylum; and directed Chau to sign a blank application form so that agency personnel could write the persecution story on the application and file it on Hu's behalf. Furthermore, based on the transcripts of Lin's conversations with Chau, a rational juror could have inferred that Hu told Lin about this conversation, and that Hu and Lin then agreed to complete and file the fraudulent application together. For example, on October 24, 1996, Chau spoke by telephone with Lin, who had apparently acquired Chau's file; during that conversation, Lin expressed reluctance to process the application after Chau said that he had not been persecuted in China, but agreed to do so after

Chau told her that the "previous person" had said that the application could be filed in "this way."

IV.

Finally, appellants argue that the District Court should not have given a *Pinkerton* charge. *See generally Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Romero*, 897 F.2d 47, 51 (2d Cir. 1990) (noting that under a *Pinkerton* theory of liability, a "conspirator can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes"). A *Pinkerton* charge should not be given where "the jury is required to resort to the inversion of *Pinkerton* and infer the existence of a conspiracy from a series of disparate criminal offenses." *United States v. Salameh*, 152 F.3d 88, 149 (2d Cir. 1998) (internal quotation marks omitted). Here, however, there was sufficient evidence, independent of the substantive counts, from which the jury could have found beyond a reasonable doubt that Hu and Lin conspired to file a fraudulent application on Chau's behalf. Moreover, this was not a case in which the jury found that defendants had participated in a "series of disparate criminal offenses." Rather, the jury convicted defendants on two substantive counts, each of which was directly related to the filing of fraudulent asylum applications on behalf of Chau. Finally, the District Court instructed the jurors that they could consider a *Pinkerton* theory of liability only if they *first* determined that the charged conspiracy existed, and that defendants were members of it. *See id.* at 149-50 (upholding use of *Pinkerton* charge where "the district court cautiously instructed the jury that [defendant] could be found guilty of the substantive crimes only

after the jury had concluded that he was a conspirator"); *United States v. Harwood*, 998 F.2d 91, 100 (2d Cir. 1993) (similar).

CONCLUSION

To summarize, we hold that:

(1) the warrant was not insufficiently particular;

(2) INS agents did not flagrantly disregard the terms of the warrant because the search they conducted bears none of the hallmarks of a general search;

(3) the evidence was sufficient to support the jury's finding that a conspiratorial agreement existed between Hu and Lin; and

(4) the *Pinkerton* charge was not erroneously given.

We have considered appellants' remaining arguments, and conclude that they are without merit.

Accordingly, the judgments entered by the District Court are AFFIRMED.

Appendix B
Order of the USCA for the Second Circuit (Denying Petition for Rehearing), February 13, 2001

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of February two thousand one.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

Dkt No: 00-1037 L,
00-1038 con

SHI YAN LIU, et al.

Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Jie Hu and Shao Zhen Lin.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By: _____
Beth J. Meador,
Administrative Attorney

Appendix C
Oral Decision of the USDC for the Southern District, June, 1998 [Pages 13a – 14a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

97 Crim. 0666 (SHS)
ORDER

SHI YAN LIU, et al.

Defendants.

April 3, 1998

Before:

HON. SIDNEY H. STEIN,

District Judge

THE COURT: I understand the arguments.

This is what I am going to do. And I've indicated that I am troubled. I won't belabor the point. I'm very troubled by the conduct of the government agents here, and particularly in connection with the concededly false statements in the affidavit underlying the warrant.

With regard to the motion to suppress everything, I am going to deny that. I find that I've indicated the cases say that the suppression of all evidence is a drastic remedy which is not normally justified unless those executing those the warrants acted in flagrant disregard of the warrant's terms,

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Oral Decision of the USDC for the Southern District

United States v. Matias, 836 F.2d 744, Second Circuit 1988. But, I find that given the baseline that I was talking about, nine out of the 35 out of the scope of the warrant, that is, boxes, that there isn't flagrant disregard; that is, the flagrant disregard standard has not been met here. So, I am not going to grant the motion, I'm going to deny the motion.

In terms of what I see as the second argument, that is the overbreadth of the warrant, the argument is that it is overbroad because it essentially allows for the seizure of all documents conceivably related to any political asylum application. And I disagree with the defendants on that. The agents need readily ascertainable guidelines as to what items to seize, and I cite *United States v. George,* 975 F.2d 72, a Second Circuit case 1992, at page 76. There are sufficient documents which bear *indicia* of fraud on their face, that is, the false addresses, is sufficient to give the guidance to the officers that George requires, that is, readily ascertainable guidelines for the executing officers.

So, I am not going to suppress everything on the basis that the warrant was overbroad.

In regard to the motion for a *Franks* hearing, again, under the *Padilla* and *Lavasseur* cases, the burden on the defendants is very heavy. They have to make a substantial preliminary showing in order to get the hearing that false statements were included in the warrant affidavit. That's the first hurdle, That hurdle they've met, and I've berated the government on that point and, again, it continues to be troubling.

I do think, however, that there is probable cause independent of those false statements, and Mr. Gilbert listed them.

Appendix D
Ruling of the USDC for the Southern District,
November 16, 1998 [Pages 15a – 16a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

97 Crim. 0666 (SHS)
ORDER

SHI YAN LIU, et al.

Defendants.

SIDNEY H. STEIN, U.S. District Judge

By order dated April 8, 1998, for the reasons set forth on the record on April 3, 1998, this Court denied defendants' motion to suppress the fruits of a July 10, 1997 search of the premises at Suites 202 and 501 at 52 East Broadway, New York, New York. Defendants have requested that that ruling be reconsidered, and that a hearing be held to establish facts necessary to the Court's determination of whether the government agents who conducted the search in question acted in flagrant disregard of the scope of the warrant.

Defendants have properly noted that this Court's finding that ten file folders that were seized bore indicia of fraud on their face is not sufficient factual basis for the holding that the agents who conducted the search did not act in flagrant disregard of the warrant's terms. Accordingly, defendants' request for a hearing on the issue of whether the agents who conducted the search flagrantly disregarded the scope of the warrant is granted.

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Ruling of the USDC for the Southern District

Dated: New York, New York
June 19, 1998

SO ORDERED:

By:_____
Sidney H. Stein, U.S.D.J.

Appendix E
Oral Decision of the USCA for the Second Circuit,
November 16, 1998 [Pages 17a – 20a]

THE COURT: I think I have heard enough. I am going to deny the request for the additional people, given the state of the record so far and the timing of the request. The question is whether the search was conducted in flagrant disregard of the scope of the search warrant. If so, it would result in a suppression of all the documents, pursuant to *United States v. Rettig,* 589 F.2d 418 (3rd Cir. 1978).

The standard of flagrant disregard, as I have said several times, is extremely high. The closest case I could find in this Circuit is *United States v. Glass Menagerie, Inc.,* 721 F.Supp. 54, 60-61 (S.D.N.Y. 1989). There is an Eighth Circuit case which also has very similar facts. *Marvin v. U.S.,* 732 F.2d 669, 675. In order to sustain an attack on a search as being in flagrant disregard of the warrant, there must be a determination by me that the agents acted in bad faith in executing the warrant, such that a specific search for the documents set forth in the rider became a general search. I am not prepared to draw that conclusion. On the basis of the evidence so far and viewing the credibility of Agent Bogdanski, as I am obligated to do, I find that the agents did not act in bad faith in executing the search warrant here.

Similarly, in viewing the credibility of the witness, and all of the exhibits that I have been looking at and have looked at, I do not find that the search was a pretext to look for evidence outside the scope of the warrant. I repeat that the uncontradicted evidence is that it was Agent Bogdanski who was deciding which documents to seize and which not to seize.

I find that the agents attempted to stay within the boundaries of the warrant; that this obtaining of documents outside of the scope of the warrant--that is, the 4,000 documents that were returned and the additional items referred to, to wit, some computer disks that didn't have relevant information on them--was due to either time constraints or practical considerations, such as the need to

follow up the cross-check of the names with respect tot the telephone numbers, and the alien registration numbers on the supporting documents with political asylum applications--something that could not have been done on site, and probably should not have been done on site, given the testimony as to how long it would take to make that cross-check. Therefore, I find that there is no bad-faith effort to gain information outside of the warrant.

The recurring address of 55-03 Van Doren Street, Suite 1R, Corona, New York, was sufficient grounds to seize the 1,200 files after the review of 50 of them by the agent who testified. In fact, the evidence is that the applications listed the Van Doren address or the home address. I think you have fodder at trial for arguing that there is absolutely nothing improper or illegal about that address if you are going to make an argument that the form called for a mailing address as opposed to a residence address. Obviously, the government has responses to that, including the fact that that rider at the end of the applications for the preparer to fill out apparently wasn't filled out by the preparer. Those are arguments that can be made, such as the fact that there is nothing illegal about the political asylum applications, but it is not a ground to argue that this search and seizure was done in flagrant disregard of the warrant. Of the 1,200 files seized, 1,004 listed either the Van Doren address or 61 East Broadway, Suite 170. Similarly, the form G-352A and the supporting documents apparently on multiple occasions listed the Van Doren address as "residence in the United States." In addition, the testimony was that agents did not seize all political asylum documents.

Similarly, a political asylum story was up on the computer screen. So, rather than go through the process of putting the disks up to try to read all of the disks on that computer, they took the disks with them in order to do so. I don't know that they should have taken the monitor, but on

the state of this agent's testimony, which is the only evidence I have, he thought that he was assisting in preserving the political asylum story that was up on the screen. Apparently he believed that he would have better access to the disks if he took the monitor. I think the hard drive was taken as well, if I remember. But even if I were able to say, as a technological matter, that is not true, certainly that was his good-faith belief.

The same, too, with the insurance documents and the driving school documents. They were taken because the CI's had informed him that people with political asylum cases that were being made up were being steered to purchase insurance and go into the driving program, so they thought they would be able to get a handle on who the true political asylum applicants are by cross-indexing the names and the telephone numbers on the insurance and driving school applications with the allegedly fraudulent political asylum applications.

I have already spoken to those documents that clearly should not have been taken, but life is not perfect and there are not a significant number of them. As a matter of fact, all the nonresponsive items have been returned.

For the foregoing reasons, I am denying the request at this time for additional witnesses, and I am denying the motion to strike all of the seized documents and other things on the ground that the warrant was executed in flagrant disregard of its terms. Sir?

MR. RUDIN: In view of the testimony by Agent Bogdanski, while we would renew our motion to controvert the warrant based on the fact that it violated the particularity requirement of the Fourth Amendment--

THE COURT: That was already decided. We have already been through that.

MR. RUDIN: I know, your Honor, just for the purpose of the record, in view of his testimony about what he know at the time of the search and the discussion that he had

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with the prosecutor about that very subject, all the memos that he said he had in his possession, it seems to us that the government had an obligation to present that material, under the cases we previously cited to the Court, so that the Court could determine whether or not to authorize the seizure of the 60,000-plus documents merely because they somehow related, in the agent's view, to false address.